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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

IN RE:	§	
	§	
EPTMS, INC.,	§	CASE NO. 17-31729-HCM
	§	CHAPTER 11
	§	
DEBTOR.	§	Hearing Date Requested
	§	

**MOTION OF THE UNITED STATES TRUSTEE TO DISMISS CASE OR, IN THE
ALTERNATIVE, TO CONVERT CASE TO CHAPTER 7**

TO THE HONORABLE H. CHRISTOPHER MOTT
UNITED STATES BANKRUPTCY JUDGE:

HENRY G. HOBBS, JR., THE ACTING UNITED STATES TRUSTEE for Region 7 ("UST"), moves for an order dismissing the case or converting the case to chapter 7 pursuant to 11 U.S.C. § 1112(b) because the debtor has not filed any of the required monthly operating reports. Without those reports, the Court, UST, and creditors cannot know whether the debtor is meeting its post-petition obligations or whether it is generating sufficient income to pay creditors under a proposed plan of reorganization. In addition, the debtor has not paid any quarterly fees owed to the U.S. Trustee as required under 28 U.S.C. § 1930(a)(6). In support of this motion, the UST represents as follows:

I. Background

1. On October 25, 2017, the debtor filed a voluntary petition for relief pursuant to Chapter 11, Title 11 of the United States Code. When the case was filed, the debtor operated approximately twenty-one mattress stores. The debtor has not filed a plan of reorganization.

2. On its Schedules filed in this case, the debtor asserted that its assets were worth \$1,295,462.47, consisting primarily of \$898,000.00 in inventory and \$171,000.00 in vehicles.

3. The debtor asserted on Schedule D that it owed \$788,900.00 in secured debt. The debtor asserted on Schedule E/F that it owed \$1,549,453.54 in general unsecured debt.

4. Since the case was filed, the debtor has filed motions to reject 12 leases, stating that it has vacated or was going to vacate the premises of those 12 stores. Docket Nos. 27, 31-32, 53, 90-92, and 109-113. Those landlords may have general unsecured claims against the estate for damages arising from the rejection on their leases. The UST has been informed that two other leases expired by their terms. The debtor has filed motions to assume the leases of seven stores, where it continues to operate. Docket Nos. 117-123.

5. Until confirmation of a plan, the debtor is required to file monthly operating reports ("MORs"). L. Rule 2015(b). Those reports are due by the 20th of the month for the previous month. The debtor should have already filed MORs for October 25-November 30, 2017, December 2017, and January 2018. The debtor has not file a single MOR.

6. On February 21, 2018, the UST received a letter from the Comptroller of the State of Texas addressed to the debtor and its counsel. The letter was a notice of default. It alleged that the debtor has defaulted with the Comptroller by (1) failing to make a required \$15,000 payment, (2) failing to stay current post-petition by not paying its December 2017 taxes of more than \$18,000, (3) failing to set up a segregated sales tax account and deposit all sales taxes collected into that account, and (4) failing to file MORs.

7. Debtors are required to pay quarterly fees to the United States Trustee for each quarter that the case is open in chapter 11. 28 U.S.C. § 1930(a)(6). The fee for the fourth quarter 2017 was due by January 31, 2017. The UST's record shows the debtor has made no payment. Because quarterly fees are calculated based on the debtor's quarterly disbursements and the debtor has not filed any MORs, the UST does not know how much the debtor owes.

II. The case should be dismissed or converted to chapter 7.

8. Under section 1112(b) of the Bankruptcy Code, the Bankruptcy Court shall convert a case to chapter 7 or dismiss a case, whichever is in the best interest of the creditors and the estate, if the movant establishes cause, unless the Court finds that a chapter 11 trustee or examiner is in the best interests of the creditors and the estate or the Court finds and specifically identifies unusual circumstances that establish that conversion or dismissal of the case is not in the best interest of creditors and the estate. 11 U.S.C. § 1112(b).

9. "Timely and accurate financial disclosure is the life blood of the Chapter 11 process." *In re Berryhill*, 127 B.R. 427, 433 (Bankr. N.D. Ind. 1991). Because monthly operating reports are the means by which the creditors, the Court, and the United States

Trustee can monitor a debtor's post-petition operations, the failure to timely file its monthly operating reports by itself constitutes sufficient cause to warrant conversion of the case to chapter 7 or dismissal of this chapter 11 case. 11 U.S.C. § 1112(b)(4)(F); *Roma Group, Inc. v. Office of the United States Trustee (In re Roma Group, Inc.)*, 165 B.R. 779, 780 (S.D.N.Y. 1994) (failure to file monthly operating reports "undermines the Chapter 11 process and constitutes cause for dismissal or conversion"); *In re Bacon*, 52 B.R. 52, 53-54 (Bankr. N.D. Iowa 1985) (failure to file monthly operating reports is sufficient "cause" to warrant dismissal of chapter 11 case because "creditors are not being provided the basic financial data necessary to make decisions regarding their best interests").

10. Here, the debtor has not filed any MORs. Without complete and accurate operating reports, the Court, the UST, and creditors cannot know whether the debtor is paying its obligations as they come due post-petition or whether the debtor is accruing administrative expenses. Furthermore, the Court, the UST, and creditors cannot know whether the debtor is generating sufficient positive cash flow to fund a plan out of future earnings. Therefore, cause exists to dismiss the case or convert the case to chapter 7. 11 U.S.C. § 1112(b)(4)(F).

11. The debtor's failure to pay any quarterly fees owed to the UST under 28 U.S.C. § 1930(a)(6) also constitutes cause for dismissal. 11 U.S.C. § 1112(b)(4)(K).

12. The UST recommends dismissal. The debtor appears to have little, if any, unencumbered property, and thus it appears unlikely that the case would yield a meaningful distribution to general unsecured creditors if this case was converted to chapter 7. In the alternative, the UST recommends the case be converted to chapter 7,

so that a chapter 7 trustee can determine whether the debtor has any assets that could be liquidated to pay creditors.

13. If the case is dismissed, the UST requests that any order dismissing the case provide for payment of all quarterly fees owed to the UST under 28 U.S.C. § 1930.

WHEREFORE, for the reasons stated above, the UST prays that the Court enter an order dismissing the case or, in the alternative, converting the case to chapter 7 and for any and all further relief as is equitable and just.

Respectfully submitted,

HENRY G. HOBBS, JR.
ACTING UNITED STATES TRUSTEE
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION OF THE UNITED STATES TRUSTEE TO DISMISS CASE OR, IN THE ALTERNATIVE, CONVERT CASE TO CHAPTER 7, was served by electronic means for all Pacer system participants and/or by first class mail, postage prepaid, to all parties listed on the attached Service List on this the 26th day of February, 2018.

/s/ Kevin M. Epstein
Kevin M. Epstein
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0542-3
Case 17-31729-hcm
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